STATE OF MICHIGAN

COURT OF APPEALS

PAUL E. ROCHLEN,

Plaintiff-Appellant,

v

STEPHEN M. LANDAU and LANDAU GOLDSMITH,

Defendants-Appellees.

UNPUBLISHED
March 1, 2005

No. 249908
Oakland Circuit Court
LC No. 1999-019358-NM

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition to defendants. We affirm.

Plaintiff commenced this action against defendant[1] in December 1999, alleging legal malpractice, breach of contract, intentional misrepresentation, and negligent misrepresentation. Shortly thereafter, defendant commenced a separate action against plaintiff to collect his legal fees. The cases were never consolidated.

The trial court granted partial summary disposition to defendant in plaintiff's malpractice action in June of 2000, dismissing the malpractice claim on the ground that plaintiff failed to bring suit within two years of the accrual of the claim. The parties then rejected a case evaluation in the malpractice action and it proceeded for adjudication. Meanwhile, defendant's separate fee-collection action was dismissed by stipulation after the parties accepted a case evaluation. The trial court in plaintiff's malpractice action subsequently granted defendant's motion for summary disposition on the remaining claims on the theory that they were merely alternate forms of the malpractice claim. The trial court held, in the alternative, that the malpractice issue was raised and decided in the case evaluation for defendant's action to recover legal fees, and, consequently, was barred by res judicata from further litigation.

[1] Plaintiff sued Stephen Landau, who was plaintiff's attorney in an estate matter, and Landau Goldsmith, the business entity through which Landau practices law. Throughout this opinion, we shall refer to both Landau and Landau Goldsmith as "defendant."

Plaintiff appealed the trial court's grant of summary disposition, but only challenged the dismissal of his malpractice claim. This Court reversed, holding that a question of fact existed concerning precisely when defendant's representation of plaintiff terminated. *Rochlen v Landau*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2002 (Docket No. 232151). Defendant had urged the doctrine of res judicata, and the rule against splitting causes of action, as alternative bases for affirmance, but this Court expressly declined to reach those arguments. *Id.* On remand, defendant persuaded the circuit court to grant summary disposition of the revived malpractice claim, on the ground that plaintiff's use of his malpractice theory as a defense in the fee collection action triggered the doctrine of res judicata to bar further litigation of that claim. This appeal followed.

I. Case Evaluation Summary

We shall first address plaintiff's contention that the trial court erred when it examined the case evaluation summary submitted in defendant's fee-collection action as evidence contrary to MCR 2.403(J)(4). This Court reviews de novo a trial court's decision on a motion for summary disposition as a question of law, *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999), and reviews the trial court's evidentiary decisions for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Neither party disputes that the case evaluation summary submitted to the trial court by defendant accurately reflected the outcome of the case evaluation that the parties accepted in defendant's fee-collection action. This summary stated that defendant mishandled the legal representation of plaintiff, and, as a result, had not earned the fees sought. The document further added that plaintiff's "counterclaims . . . survive as counterclaims to this proceeding," and observed that those counterclaims are worth more than the fees claimed by defendant, but stated that they are "unfortunately . . . limited to the amount of [defendant's] claim by virtue of the partial summary disposition in Circuit Court." Finally, the summary indicated "an award to [defendant] of $1.00 will effectively neutralize [plaintiff's] claim in Circuit Court and bring an end to both this case and the Circuit Court case."

MCR 2.403(J)(4) provides that where a case has been submitted to case evaluation, "[s]tatements by the attorneys and the briefs or summaries are not admissible in any court or evidentiary proceeding." However, a court may take cognizance of what was discussed in the course of case evaluation for purposes of ascertaining whether those discussions led to adjudication on the merits of an issue. See *Amburgey v Sauder*, 238 Mich App 228, 247-248; 605 NW2d 84 (1999) (examining mediation discussions to determine whether the issue was decided on the merits). Plaintiff acknowledges that defendant has found examples where a court has taken the contents of a case evaluation summary into account, but argues that in this case the court used the summary as substantive evidence, while in those cases the issue involved the interpretation of the summary itself, the applicability or propriety of the award, or sanctions. However, in this case the trial court did not examine the case evaluation summary to assess the merits of plaintiff's malpractice claim, but rather used it to ascertain whether the malpractice claim had in fact been adjudicated.

Evaluations bring the full force of res judicata to bear on subsequent adjudications. See MCR 2.403(M)(1); *CAM Constr v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 555; 640 NW2d 256 (2002). However, if we were to interpret MCR 2.403(J)(4) as a strict bar to taking

cognizance of what was decided in the case evaluation, it would deprive such settlements of their finality by making it difficult for courts to determine whether res judicata is applicable. Therefore, we do not read MCR 2.403(J)(4) so strictly. The trial court in this case correctly consulted the case evaluation summary to the extent necessary to ascertain whether plaintiff's malpractice claim had been decided by the parties' acceptance of it.

II. Res Judicata

Plaintiff also contends that the trial court erred when it applied res judicata to its revived malpractice claim. We disagree. "We review applications of res judicata, as well as decisions on motions for summary disposition, de novo as questions of law." *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). "Under the doctrine of res judicata, 'a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.'" *Id.* (citation omitted). "The doctrine operates where the earlier and subsequent actions involve the same parties or their privies, the matters of dispute could or should have been resolved in the earlier adjudication, and the earlier controversy was decided on its merits." *Id.*

To decide this issue, we must determine whether plaintiff raised defendant's malpractice as a defense in defendant's fee collection action and, if so, what impact that had on his separate cause of action alleging malpractice.[2] Plaintiff argues that he never put the malpractice claim at issue in the fee-collection action. Plaintiff points to the affirmative defenses he listed in response to defendant's complaint, which do not include malpractice. However, res judicata is a function of judgments, not filings. *Cantwell v Southfield (After Remand)*, 105 Mich App 425, 429-430; 306 NW2d 538 (1981). The question, then, is whether plaintiff's malpractice claim was decided on the merits in the case evaluation, rather than the specifics of the pleadings involved.

Plaintiff correctly notes that all manner of subjects may be discussed in the course of case evaluation, and that mere discussion of an issue does not necessarily constitute raising and resolving it. See *Amburgey*, *supra* at 247-248. In this case, however, the summary clearly indicated that the decision to settle the fee-collection action for a nominal sum was motivated by plaintiff's malpractice claim. Therefore, the settlement of that action did in fact address the merits of that claim. Moreover, the evaluation summary states that its acceptance "will effectively neutralize [plaintiff's] claim in Circuit Court and bring an end to both this case and

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[2] While both parties discuss the rule against splitting causes of action, we do not believe that it is implicated here. The rule in Michigan is that a party pleading against another must join all claims against the other party arising from a single transaction or occurrence. MCR 2.203(A). This does not mean that the other party is limited to that opportunity to initiate his or her own claims arising from that same transaction or occurrence. MCR 2.203(E) "is permissive, as opposed to compulsory," and thus "allows a party . . . to maintain its counterclaim in a separate independent action." *Salem Industries, Inc v Mooney Process Equipment Co*, 175 Mich App 213, 216; 437 NW2d 641 (1988). Consequently, defendant could properly bring his claim for fees as either a counterclaim in the malpractice action or in a separate suit.

the Circuit Court case." Consequently, when plaintiff accepted the evaluation, he accepted that all of the claims would be dismissed, including his separate malpractice claim. *CAM Constr*, *supra*, at 555 ("accepting a case evaluation means that *all claims* in the *action* . . . are dismissed.") (emphasis in original), citing MCR 2.403(M)(1).

An action for malpractice is indivisible, and may not be "employed . . . as an affirmative defense and later as foundation" for a separate cause of action. *Leslie v Mollica*, 236 Mich 610, 615; 211 NW 267 (1926). In *Leslie*, our Supreme Court decreed that a party sued for fees has the option of raising malpractice as a defense, but that a party who has so elected "thereby visited upon himself the legal consequences resulting." *Id.* at 616-617. Accordingly, where "it is manifest that malpractice . . . was alleged and employed as an affirmative defense, and defeated the . . . claim for services," use of that defense bars malpractice as the basis for a separate claim for damages. *Id.* at 618. Our Supreme Court reiterated this same principle in *Ternes Steel Co v Ladney*, 364 Mich 614; 111 NW2d 859 (1961). The Court stated, "when a litigant's right to affirmative relief is independent of a cause of action asserted against him [but] it is relied upon only as a defense to that action, he is barred from seeking affirmative relief thereon in a subsequent proceeding." *Id.* at 619. Consequently, where a party raised malpractice as a defense in one action, which was decided on the merits, then res judicata will apply to that party in any subsequent action for malpractice.

Likewise, the fact that defendant's fee action was filed after plaintiff's malpractice action does not necessarily bar the application of res judicata. A judicial decision is final only after the appellate process has run its course. *Cantwell*, *supra* at 429-430. Because plaintiff's malpractice claim has not yet lived out its appellate life, and because the fee-collection action resulted in a judgment that is not now subject to appeal, the fee collection action has produced a final decision that constitutes res judicata for the malpractice action.

Therefore, the trial court properly noted that plaintiff's malpractice claim had been asserted and decided in the case evaluation of defendant's fee-collection action, and properly applied res judicata to plaintiff's separate malpractice claim.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski